

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye  
David C. Boyd  
Marshall Johnson  
Thomas Pugh  
Phyllis A. Reha

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Complaint of the  
Minnesota Department of Commerce Against  
Qwest Corporation Regarding Unfiled  
Agreements

ISSUE DATE: September 27, 2007

DOCKET NO. P-421/C-02-197

ORDER VACATING EARLIER ORDERS  
AND ESTABLISHING COMMENT  
PERIODS

**PROCEDURAL HISTORY**

**I. Original Orders in this Proceeding**

On February 14, 2002, the Minnesota Department of Commerce (the Department) filed a complaint against Qwest Corporation alleging that Qwest had violated key provisions of the federal Telecommunications Act of 1996 and of Minnesota telecommunications statutes by failing to file with this Commission eleven interconnection agreements with certain competitive local exchange carriers (CLECs).<sup>1</sup>

The Department claimed that these agreements granted preferential treatment to the CLECs involved and that the failure to disclose their existence and terms (1) prevented other CLECs from exercising their statutory rights to seek comparable treatment from Qwest; (2) caused economic harm to other CLECs; (3) harmed the emerging competitive marketplace for local telecommunications services; and (4) prevented the Commission from discharging its statutory duty to protect Minnesota consumers from the consequences of discriminatory and anti-competitive conduct in the emerging local-telecommunications market.

The Commission referred the complaint to the Office of Administrative Hearings for contested case proceedings. The Administrative Law Judge assigned to the case conducted evidentiary hearings and

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<sup>1</sup> Later, the Department of Commerce amended its complaint to add a twelfth interconnection agreement.

filed his Findings of Fact, Conclusions and Recommendations on September 20, 2002. The Administrative Law Judge found that Qwest had knowingly and intentionally violated provisions of state and federal telecommunications statutes prohibiting discriminatory and anti-competitive conduct by incumbent local exchange carriers. He also found that penalties were justified under Minn. Stat. § 237.462, the statute authorizing the Commission to assess administrative penalties for anti-competitive conduct.

On November 1, 2002, the Commission issued an Order adopting the Administrative Law Judge's Report in its entirety and soliciting comments on appropriate penalties under Minn. Stat. § 237.462. On December 18, 2002 and February 28, April 30, and May 21, 2003, the Commission issued Orders under Minn. Stat. § 237.462, applying the statute's analytical framework for assessing penalties to the facts of the case, and refining that analysis in light of parties' comments and further Commission deliberations.

On May 21, 2003, the Commission issued its final Order in the case, rejecting Qwest's second request for reconsideration and leaving in place the earlier-calculated statutory penalty of \$25,955,000. This penalty was upheld on appeal by the federal district court for the District of Minnesota and by the Eighth Circuit Court of Appeals.<sup>2</sup>

## **II. Code of Conduct Investigation and Related Proceedings**

On August 16, 2005, Qwest Corporation (Qwest) filed comments in a Commission proceeding investigating whether former Commissioner Gregory Scott's acceptance of employment with Integra Telecom less than one year after leaving the Commission violated Minn. Stat. § 216A.036.<sup>3</sup>

In those comments Qwest stated that telephone and e-mail records attached to the report of the Independent Counsel showed a disproportionately large number of calls and e-mails between then-Commissioner Scott and Ms. Mary Tribby, then regulatory counsel for AT&T Communications of the Midwest, Inc. (AT&T). Since AT&T had been a party in several major cases – including this one – during the time in which these communications occurred, Qwest urged an independent investigation to determine whether any of these contacts represented prohibited *ex parte* communications.

The Commission asked the Commissioner of the Department of Employee Relations to appoint an independent investigator to examine Qwest's allegations, and the Commissioner appointed two former Administrative Law Judges, Allan W. Klein and George A. Beck.

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<sup>2</sup> *Qwest Corp. v. Minnesota Public Utilities Com'n*, Civ. No. 03-3476 (D. Minn., August 25, 2004); *Qwest Corporation v. Minnesota Public Utilities Commission*, 427 F.3d 1061 (8<sup>th</sup> Cir. 2005).

<sup>3</sup> *In the Matter of a Commission Investigation of Issues Governed by Minnesota Statutes, Section 216A.036*, Docket No. P-5643, 426/CI-04-1790.

The Independent Investigators found that there was no reasonable cause to believe that former Commissioner Scott engaged in prohibited *ex parte* communication with Ms. Tribby from May of 2002 through May of 2004.

They found that there *was* reasonable cause to believe the following:

- (1) Former Commissioner Scott engaged in actions that may well have resulted in or created a conflict of interest.
- (2) Former Commissioner Scott engaged in actions that created an appearance of impropriety.
- (3) Former Commissioner Scott engaged in actions that adversely affected the confidence of the public in the integrity of the Commission and in the impartiality of its decision making process.

On June 30, 2006, the Commission issued an Order finding:

- (1) The record did not establish reasonable cause to believe that former Commissioner Scott violated the *ex parte* prohibitions of Minn. Stat. § 216A.037.
- (2) The record did establish that former Commissioner Scott violated the Commission's code of conduct, specifically Minnesota Rule 7845.0400, which prohibits certain actions that might result in a conflict of interest.
- (3) The code of conduct violations required the Commission to reexamine the penalty determinations in the two cases on which Qwest sought redeliberation, one of which was this case.
- (4) Upon re-examination, the penalty determination in this case was reasonable, fully supported by record evidence, based on reasoned and principled judgments, and not the result of improper or undue influence. The Commission therefore declined to vacate or reopen the penalty determination.

Qwest sought judicial review from the Minnesota Court of Appeals. The Court concurred with the Commission that the record did not support a finding of prohibited *ex parte* communications between former Commissioner Scott and Ms. Tribby. The Court also remanded the penalty determination in this case for further proceedings, finding as follows:

. . . the record indicates that the Unfiled Agreements penalty was at least partially the result of Scott's improper influence. We conclude that redeliberation of the penalty would serve the public interest, the interests of justice, and public confidence in the Commission's decision-making processes. Therefore, we reverse

and remand, thereby ordering the Commission to vacate the Unfiled Agreements penalty and redeliberate an appropriate penalty.<sup>4</sup>

### **FINDINGS AND CONCLUSIONS**

The Minnesota Court of Appeals has ordered the Commission to vacate the \$25,955,000 penalty assessed in this case and to redeliberate the penalty issue, free of the potentially improper influence of former Commissioner Scott. The appropriate penalty is the only issue; neither Qwest nor any other party has contested the Commission's adoption of the Administrative Law Judge's finding that Qwest knowingly and intentionally violated state and federal statutes governing the conduct of incumbent local exchange carriers vis-a-vis new entrants.

The Commission will vacate each of the four Orders in this case going to the issue of appropriate penalties: *Order Requiring Plan and Authorizing Comments* (December 18, 2002) *Order Assessing Penalties* (February 28, 2003), *Order on Reconsideration on Own Motion* (April 30, 2003), and *Order Denying Qwest's Second Request for Reconsideration* (May 21, 2003).

The Commission will redeliberate the penalty issue, based on the nine factors it is required to consider under Minn. Stat. § 237.462, subd. 2 and on the record developed by the Administrative Law Judge. The Commission will define the record in this way to obviate the effects of any improper influence former Commissioner Scott may have had on the content, direction, or scope of the submissions on penalty issues, which were filed after the November 1, 2002 Order. Commenting parties will be permitted to introduce uncontested, public information, including information relating to events subsequent to the filing of the Administrative Law Judge's Report, to support their arguments on how the statutory factors should be weighed in setting a new penalty.

Finally, the Commission will ask interested persons and parties to file comments on how the nine penalty considerations set forth in Minn. Stat. § 237.462, subd. 2 correlate with the evidence in the record and on what penalty amount the record evidence supports or suggests. The Commission will establish an initial comment schedule, with initial comments due on October 9 and reply comments due on October 23. To ensure procedural flexibility and adequate record development, however, the Commission will delegate scheduling and case management responsibilities to the Executive Secretary.

The Commission will so order.

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<sup>4</sup> *In re Commission Inquiry Regarding Potential Proscribed Ex Parte Contacts Regarding Com'r Scott*, Not Reported in N.W.2d, 2007 WL 2177868, Minn.App., July 31, 2007 (No. A06-1578.)

## ORDER

1. The Commission hereby vacates the four Orders issued in this case on the issue of appropriate penalties under Minn. Stat. § 237.462: *Order Requiring Plan and Authorizing Comments* (December 18, 2002) *Order Assessing Penalties* (February 28, 2003), *Order on Reconsideration on Own Motion* (April 30, 2003), and *Order Denying Qwest's Second Request for Reconsideration* (May 21, 2003).
2. The Commission invites parties and interested persons to file comments on appropriate penalties, based on the nine factors the Commission is required to consider under Minn. Stat. § 237.462, subd. 2, and on the record in this case as it existed on November 1, 2002. Comments may include uncontested, public information, including information relating to events subsequent to the filing of the Administrative Law Judge's Report, to support arguments on how the statutory factors should be weighed in setting a new penalty.
3. Initial comments shall be filed by October 9, and reply comments shall be filed by October 23.
4. The Commission hereby delegates to the Executive Secretary scheduling and case management authority in this case, including the authority to amend time frames and to permit additional filings as administrative efficiency requires.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

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